also noted the uncertainty about the receipt for the deposit of $1000 alleged to have been paid and observed that this receipt now said to have been conveniently lost was never mentioned in the appellant's affidavit of documents as having been previously in his possession. The trial judge thought, in our view, entirely correctly, that the onus of establishing the part played by Ah Pin which the appellant relied on in proof of the oral agreement of sale was on the appellant and his failure to call Ah Pin raised an adverse inference against him, under the provisions of section 114(g) Evidence Act 1950. As too, his failure to obtain the evidence *de bene esse* or on commission of one Mohamed whom he said was present when he was asked by the 1st respondent whether he wished to buy the premises and he had replied he did, and who had gone to India. The appellant also conceded that he had at no time the means to complete.

The trial judge heard the appellant and his witnesses with patience and after a detailed analysis of their evidence, he was of the opinion that the appellant was as evasive and unreliable a witness as one could find and his two witnesses were no better.

By contrast, he found the houseowners reliable witnesses and he accepted their evidence as well as that of the 3rd respondent, that no offer was ever made to sell the premises to the appellant, no authority was given for the renovations and no advice was given to the appellant of the proposed sale to the 3rd respondent.

The submissions to him were only on the evidence, with one exception, a reference to section 26 of the Specific Relief Act, 1950 and *Ong Chat Pang & Anor.* v. *Valliappa*[1] which is a case dealing with the principle of a *bona fide* purchaser for value without notice of an earlier contract and which, coming from counsel for the appellant, could only be relevant if he had first established the prior contract. The trial judge treated the case, therefore, as he was advised by counsel to do so, almost entirely as a case involving evidence and the proof of facts. On the whole of the evidence, he was of the opinion that the appellant had failed to establish any oral agreement of sale or the payment of the deposit of $1000. His findings are therefore of pure facts.

In such circumstances, it ought not to be and it is not the practice of this court as an appellate court, to differ. We must heed what Lord Russell of Killowen said in *Oh Hiam (f) & Ors.* v. *Tham Kong*[2]:

"...The Federal Court... sought to analyse the Notes of Evidence, arriving at a diametrically opposite view to that taken by the trial judge on which evidence should be accepted. This approach in an appellate court is on general principle very rarely acceptable, as has more than once been said by the Board, notably recently in *Chow Yee Wah* v. *Choo Ah Pat.*"[3]

We did so, among others, in *S. Soonaratnam & Anor.* v. *S. Ramalingam.*[4]

It is perhaps in the realisation that we will refuse to differ from the trial judge, especially where there is, as in this case, an abundance of evidence on a critical analysis thereof, for the findings, that Mr. J.R. Devadas, who appeared as counsel at the appeal, prefaced his appeal with a motion to amend the statement of claim. We heard Mr. Devadas at length but very obviously, the terms of the amendment merely sought to comply with the rules of pleadings and to avoid the criticism of the evidence departing from the pleadings but they could not and did not explain the numerous variations and resilements in the appellant's oral evidence which branded him in the view of the trial judge as a totally unreliable witness. The appellant could not therefore hope to succeed on these amendments, if allowed, and for this reason, the motion must be and was refused: *Tindok Besar Estate Sdn. Bhd.* v. *Tinjar Co.*,[5] following *Curran* v. *William Neill & Sons (St. Helens) Ltd.*[6] We observed, not without interest that Mr. Devadas pleaded, in as many words, for a new trial. That was obviously the real purpose for the amendments sought, but nothing is clearer than that the appellant should not be given a further chance to prevaricate.

We had no difficulty in dismissing the appeal and we did so, without calling on counsel for the respondents to reply. The appellant was ordered to pay the costs of the appeal.

Appeal dismissed.

Solicitors: *Paramjit Singh & Co.; Concisom & Clark.*

OVERSEA-CHINESE BANKING CORPN. LTD. v. PHILLIP WEE

[O.C.J. (Mohamed Zahir J.) January 23-24 & March 8, 1980]
[Kota Bharu — Civil Suit No. 95 of 1975]

Limitation — Overdraft facilities — Claim for payment of balance — Whether statute-barred — Revival of cause of action by subsequent promise to pay.

Banking — Overdraft facilities — Claim for payment of balance — Whether claim statute-barred — Revival of cause of action by subsequent promise to pay.

The plaintiff in this case sued the defendant for $44,250.72 being the amount due and payable to the plaintiff on a current account. The defendant was on or about October 2, 1963 granted overdraft facilities by the plaintiff and the amount then granted to the defendant was up to $25,000. The account became dormant since 1965 and interest at 10.8% per annum began to accumulate. The overdraft was secured by a charge executed by the defendant's father, since deceased, of a piece of land up to the limit of $25,000 and interest.

The present claim, which was commenced on June 15, 1975, was for the balance of the amount due after deducting the amount due from the estate of the defendant's father, the guarantor.

The issue before the court was whether the plaintiff's claim was statute-barred. A letter dated January 14, 1974 was written by the defendant addressed to the plaintiff's solicitors requesting "for a postponement of the application to a date sometime in the middle of March 1974 so as to enable (him) to raise as initial payment to O.C.B.C. Ltd., Kota Bharu a sum of about $25,000."

Held, allowing the plaintiff's claim: (1) the defendant's letter dated January 14, 1974 revived the time for suing by the plaintiff and started time to run afresh;

(2) all that is necessary for an acknowledgement which takes the case out of the statute is that the debtor should recognise the existence of the debt, or that the person who might rely on the statute should recognise the rights against himself;

(3) the acknowledgment need not even contain a promise to pay and it is immaterial that the amount of the debt is

not expressed in the acknowledgement or that the correctness of the amount claimed is disputed in the acknowledgement.

Cases referred to:-

(1) *Joachimson* v. *Swiss Bank Corporation* [1921] 3 K.B. 110.
(2) *Bradford Old Bank* v. *Sutcliffe* [1918] 2 K.B. 833.
(3) *Parr's Banking Co. Ltd.* v. *Yates* [1898] 2 K.B. 460.
(4) *Bian Chiang Bank Bhd.* v. *Kwong Hing Cheong* [1978] 2 M.L.J. 193.
(5) *The Kwong Yik (Selangor) Banking Corporation Ltd.* v. *Malayan Daily Express (1926) Ltd. & Ors.* [1933] M.L.J. 198.
(6) *Wright* v. *Pepin* [1954] 2 All E.R. 52.
(7) *Lewin* v. *Wilson* (1886) 11 A.C. 639.
(8) *Re Lord Clifden* [1900] 1 Ch. 774.
(9) *Harlock* v. *Ashberry* (1882) 19 Ch. D. 539.

CIVIL SUIT.

Foo Say Ghee for the plaintiff.

M.S. Nayagam for the defendant.

Cur. Adv. Vult.

Mohamed Zahir J.: The plaintiff sued the defendant for $44,250.72 being the amount due and payable to the plaintiff on a current account. The defendant was on or about October 2, 1963 granted overdraft facilities by the plaintiff bank and the amount then granted to the defendant was up to $25,000.

The account became dormant since 1965 and interest at the rate of 10.8% per annum began to accumulate. The overdraft was secured by a charge executed by the defendant's father, since deceased, of a piece of land up to the limit of $25,000 and interest.

On September 26, 1974, the plaintiff obtained an order for sale of the properties charged. On June 15, 1975 the plaintiff filed these proceedings against the defendant for the balance of the amount due after deducting the amount due from the estate of the defendant's father, the guarantor. The estate of the guarantor was administered by the Official Administrator and in compliance with the order of court aforesaid the Official Administrator paid on November 13, 1975 to the plaintiff the sum of $25,000 being the principal guaranteed on the charge and on February 23, 1976 a further sum of $8,562 being the interest due. These payments were made after the issue of the writ by the plaintiff against the defendant. The amount claimed by the plaintiff being the balance due to the plaintiff has been agreed by both parties and the issue before me is whether the plaintiff's claim is statute-barred. The earlier plea of *res judicata* was abandoned by the defendant.

The plaintiff's counsel argued that time starts running from the date of demand i.e. on January 3, 1973 when the plaintiff sent a notice to the defendant demanding the repayment of the amount due. He quoted *Halsbury's* Laws of England, 3rd Edition, page 217 which referred to the case of *Joachimson* v. *Swiss Bank Corporation*[1] where in that case the customer had a credit balance to the bank, it was held that a previous demand was necessary before an action could be maintained and it was held that action in that case was not statute-barred. Counsel argued that applying the principle of that case in reverse, the bank's cause of action will only accrue after demand.

However, it appears that in the case of a loan by the bank it is being treated as any other loan and time starts running after such loan is granted (see *Bradford Old Bank* v. *Sutcliffe*[2] and *Parr's Banking Co. Ltd.* v. *Yates.*[3] On the other hand, it would appear that the amount in the credit account of a bank customer cannot be treated as a loan as the customer never intended to hand the money to the bank (see also *Bian Chiang Bank Bhd.* v. *Kwong Hing Cheong*[4]).

Counsel for the plaintiff also submitted the case of *The Kwong Aik (Selangor) Banking Corporation Ltd.* v. *Malayan Daily Express (1926) Ltd. & Ors.*[5] where it was held that time does not run against a guarantor until demand is made by the bank. That case is distinguished from the *Parr's Bank* case as there was a deed of guarantee executed where the guarantor undertakes to pay "of all moneys which may at any time be due to you from the firm on the general balance of its account with you". In the instant case the defendant had not executed any agreement that advances are payable on demand. Counsel's submission on this point therefore fails.

He, however, submitted the alternative if time runs from default then there was acknowledgement on the part of the defendant *vide* the defendant's letter dated January 14, 1974 (Exhibit P7). The letter is addressed to the plaintiff's solicitors written and signed by the defendant with the heading of Originating Summons No. 109/73 and the parties consisting of the plaintiff and the beneficiaries of the guarantor in which the defendant was one of them. The letter reads as follows: —

"I am one of the respondents abovenamed. I write to request for a postponement of the application to a date sometime in the middle of March 1974 so as to enable me to raise as initial payment to O.C.B.C. Ltd., Kota Bharu a sum of about $25,000 from the sale of a rubber estate amounting to about 29 acres.

I hope to arrange to sell the property comprised in the charge and from the proceeds thereof the official administrator will be able to pay the balance owing to O.C.B.C. Ltd. I shall be able to disclose to the court at the next date of hearing as to whether the sale of the property could be finalized."

I am in agreement with counsel that the defendant's letter dated January 14, 1974 revives the time for suing by the plaintiff and starts time to run afresh. Section 26(2) of the Limitation Ordinance reads as follows:

"Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment:"

"Acknowledgment" is not defined by the Limitation Ordinance. It merely states "acknowledges the claim". Michael Franks on *Limitation of Actions* at page 218 says as follows: —

"With regard to liquidated claims the defendant must expressly or by implication admit that the claim is at that time existing, due and unpaid, but it is not necessary that the acknowledgment should actually name the sum, if the debt can be connected with the acknowledgment by positive evidence or inference."

Counsel for the defendant replied that the defendant wrote the letter as a beneficiary of the deceased guarantor and it concerned foreclosure proceedings against the properties of the deceased guarantor. This

could very well be the case. But I am of the opinion that the defendant in this context cannot have a split personality. He is in fact both a beneficiary of the estate of the deceased as well as the operator of the accounts. He even promised in his letter that he hoped to arrange to sell the properties in the charge and to pay the balance owing to the plaintiff. This is not merely an implication to pay but a clear unequivocal promise to pay. It was not his business to write the letter as at that time there was an administrator appointed, that was the Official Administrator and it relates to his account. He is clearly "the person accountable therefor ..." under section 26(2) of the Ordinance. Again, I am of the opinion that the defendant cannot claim to be acting on behalf of the estate of his father as there was an administrator already appointed.

All that is necessary for an acknowledgment which takes the case out of the statute is that the debtor should recognise the existence of the debt, or that the person who might rely on the statute should recognise the rights against himself (see *Wright* v. *Pepin*[6]). The acknowledgment need not even contain a promise to pay and it is immaterial that the amount of the debt is not expressed in the acknowledgment or that the correctness of the amount claimed is disputed in the acknowledgment (see *Halsbury's* Laws of England, 3rd Edition, page 300).

The words "the person liable or accountable therefor" means generally anyone who is entitled to tender the money and whose tender the creditor is bound to accept. In this case if the defendant were to tender the money, even if he were to state that he did so in his capacity as a beneficiary of the estate of his father, the plaintiff must accept his tender because it was the defendant's own debt. In the case of *Lewin* v. *Wilson*[7] Lord Hobhouse stated as follows at page 646:

"In this case their Lordships think it sufficient to say that payments made by a person who under the terms of the contract is entitled to make a tender, and from whom the mortgagee is bound to accept a tender, of money for the defeasance or redemption of the mortgage, are payments which by section 30 give a new starting point for the lapse of time."

The principle of the above case is followed by *Re Lord Clifden.*[8]

In *Harlock* v. *Ashberry,*[9] Jessel M.R. at page 546 stated as follows: —

"Therefore on principle and on authority I think that the payment to take the case out of the statute must be a payment by a person who is bound to pay the principal or interest of the mortgage money."

By way of analogy, even though the instant case did not involve any payment, the defendant is the person who is bound to pay towards the principal and interest and the fact that he had made such promise to pay revives the cause of action so as to start running afresh from the date of acknowledgment.

I therefore enter judgment for the agreed sum of $44,250.72 with interest thereon at 10.8% with monthly rests as from December 26, 1972 to date of realisation and costs to be taxed.

Order accordingly.

Solicitors: *Foo Say Ghee & Co.; Nayagam & Co.*

CHU BEOW HIN v. PUBLIC PROSECUTOR

[A.C.J. (Mohamed Zahir J.) February 24, 1980]
[Kota Bharu — Criminal Appeal No. 32 of 1977]

Price Control — Failure to affix tags on cloths — Plea of guilt — Order of forfeiture and imprisonment — Appeal against sentence — Whether President had discretionary power to order forfeiture — Price Control Act, 1946 (Revised 1973), ss. 14(2)(a) & (b) & 22(1) — Criminal Procedure Code (F.M.S. Cap. 6), s. 407.

Interpretation — Rule of construction of penal law — Act to be construed narrowly in favour of person proceeded against.

Criminal Law and Procedure — Scope of s. 407 of Criminal Procedure Code — Application of rule of construction.

The appellant in this case had pleaded guilty to the charge of failing to affix tags on cloths, an offence under section 22(1) of the Price Control Act 1946 (Revised 1973). The learned President fined him in the sum of $5,000 in default 8 months' imprisonment, and ordered cloths seized to be confiscated. The appellant appealed against sentence.

Held, allowing the appeal: (1) the rule of construction of penal law is that acts imposing criminal or other penalties should be clear and unambiguous and should be construed narrowly in favour of the person proceeded against;

(2) in the absence of any express provisions of the Price Control Act, the Court can only exercise the provisions of section 407 of the Criminal Procedure Code as to the disposal of properties and in the circumstances of this case the lower court has no discretionary power to forfeit the cloths seized from the appellant's shop under the Price Control Act and such powers should be exercised under section 407 of the Criminal Procedure Code under which in this case there is no discretionary power to forfeit;

(3) the goods should therefore be returned to the appellant.

CRIMINAL APPEAL.

Anthony Gomez for the appellant.

Mohamed Raus bin Shariff (Deputy Public Prosecutor) for the prosecution.

Cur. Adv. Vult.

Mohamed Zahir J.: The appellant appeals against the sentence of the learned President who fined the appellant in the sum of $5,000 in default 8 months' imprisonment and ordered cloths seized to be confiscated. The appellant was charged for committing an offence under section 22(1) of the Price Control Act, 1946 (Revised 1973) for failing to affix tags on the cloths. He pleaded guilty to the charge.

The only ground of appeal is that the sentence is excessive. The value of the cloths was, as claimed by the appellant in his petition of appeal, $20,000 although this was not disclosed in the record of appeal.

In mitigation, the appellant who appeared in person prayed for a lenient sentence and stated that the price of the cloths had not been paid in full and prayed that the cloths be returned to him. He further stated that only a few of the goods in his shop were not tagged, whereas the rest were.

It is noted from the record that the prosecution made no submission about the sentence before the imposition of the sentence by the learned President. The President justified his sentence on setting out circumstances which he himself came to know such as the retailer could sweet-talk a customer into buying